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FILED
JUN 2 6 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No.07-1224

In the Supreme Court of the United States

Susan B. Showalter,
Petitioner;
v.

NationsBank, N.A.,
Respondent;
v.

Albuquerque Title Company, Inc.
Respondent;

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF
THE STATE OF NEW MEXICO

PETITION FOR REHEARING

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CONSTITUTIONAL PROVISIONS REGULATIONS AND STATUTES

NMSA 57-12-2 (D)(14)(15)(17) UNFAIR TRADE PRACTICES, Any false or misleading oral or written misrepresentation of any kind made in the regular course of trade or commerce in connection with the sale of services or in the extension of credit or in the collection of debts which does or tends to deceive any person NMSA 57-12-1(D)(14) by using innuendo or ambiguity as to a material fact if doing so deceives or tends to deceive (15) stating that a transaction involves rights, remedies, or obligations which it does not have,(17) failure to deliver the quality or quantity of goods or services contracted for, and, an
NMSA 57-12-2 (E) (2) UNCONSCIONABLE TRADE PRACTICE which results in a gross disparity between the value received by a person and the price paid...7-8.

ARTICLE VI, CLAUSE 2, SUPREMACY CLAUSE
This Constitution and the Laws of the United States shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound

thereby, any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding.....13

SEE PETITION FOR REGULATIONS

PETITION FOR REHEARING

Petitioner, Susan B. Showalter, moves the Court for Petition for Rehearing based on substantial grounds not previously presented of intervening circumstances of a controlling effect and procedural errors outside normal and accepted judicial procedure which has deprived Petitioner of Property calling for this Court's supervisory authority over a proceeding which has affected her property rights. New Mexico Court failed to realize that the Wisconsin Order protected Petitioners interest, failed to reverse judgments not based on substantial evidence and grant Petitioner damages for Unfair Trade Practices.

The following outlines the Intervening Circumstances of a Controlling Effect or substantial grounds not previously presented:

No one had authorization to use Petitioners funds in the transaction.

Petitioner did not receive an interest in the Title or in an entity holding title. Petitioner was not a party to the Purchase Agreement. There were no written escrow agreements signed by all parties to the transaction. There were no duly authorized powers of attorney.

The proximate cause of the litigation was Albuquerque Title Company, who violated the Administrative Code. They failed to use forms as promulgated for use by the Superintendent of Insurance, accepted funds which did not correspond to the purchase contract, without escrow instructions signed by all parties to the transaction, misrepresented that Petitioner's funds would be protected if held in her own account and under her social security number and control, they did not have

duly acknowledged power of attorney, commingled funds under Petitioners name and social security number, failed to Interplead, proceeded to closing, did not produce conflicting demands on them, and refused to acknowledge Petitioners attorneys notice that due to material changes to the contract Petitioner was entitled to her funds.

Buyer refused to provide promised documentation to recognize Petitioners interest in the Title. Petitioner asked if her attorney could prepare docs and Buyer agreed. Petitioner set up the closing on the scheduled date, and Buyer and Seller agreed not to close.

Instead of closing the transaction Petitioner agreed to on the scheduled date, Buyer and Seller agreed to amend the expired contract and close with a real estate installment contract with limited rights of redemption, which Petitioner did not agree to.

Petitioner had informed Buyer, Seller, and Title Company that she did not agree to close without formal documentation.

These funds were not escrow funds. They were earnest money funds which are refundable.

On November 23, 1998, Wisconsin Transcript states,"the Order which proceeds this dismissal without prejudice and that's important here that it be placed in a separate escrow account in the bank with the understanding that the money should not be paid over to NationsBank. He expressed concern that a transaction had been closed, despite the Injunction, using a land installment contract and he wanted to preserve Petitioners interest."[1]

The funds are in an interest bearing account for

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[1] Judge, "I think that the Court can do something that still preserves the Interest of Susan B. Showalter"

the benefit of Petitioner, Buyer, or Albuquerque Title, not NationsBank.

No Order has been entered to address the Wisconsin Order regarding who benefits from the Interest.

Court failed to realize Wisconsin Judge acted to protect Petitioners interest.

Bank reported Petitioner to the FBI who found Petitioner did not misappropriate funds which she has been deprived of.

Buyer defaulted on the property.

NationsBank Access Identifier Agreement states that if any inconsistency exists between the Deposit Agreement and this agreement, then this Agreement Governs.[2]

An Owners Insurance Policy was provided, however, Petitioner was denied payment by the Title Insurer; no record of her funds being used in the transaction.

The presiding Judge left the bench prior to addressing damages on Petitioner's Unfair Trade Practices claims.

ARGUMENT

On March 4, 2002 in CV-98-11599, Petitioner's Attorney made the following argument to the New Mexico Court of Appeals:

> The Court concludes that it is undisputed that ATC opened an Interest bearing account at NationsBank for the earnest money pursuant to the purchase agreement. However, there is no evidence in the record to support that conclusion; or at the very least there are disputed material facts on

[2] NationsBank Access Identifier Agreement (RP064)

this issue.

> "A review of the entire record demonstrates that there is no testimony from ATC or NationsBank regarding the terms of the account. Nor is there any documentary evidence to support the claim that the account was set up pursuant to the Purchase Agreement. There is no signature card showing that ATC personnel were allowed to withdraw the money."

"Neither ATC nor NationsBank were able to locate a signature card."

> "It is also significant that in 1999, Ms. Showalter executed a W-9 form at the request of NationsBank. (RP 1667-1676) This was equivalent to a signature card according to NationsBank's own documents. (RP 0863-0872) Thus Ms. Showalter was a signatory on the account. That piece of evidence alone is evidence of Ms. Showalter's authority to withdraw her money."

In addition he argued:

> 2. "On December 13, 1999, while at NationsBank ...Showalter provided her name social security number and photo ID. The NationsBank computer and the resultant printout showed that Ms. Showalter was the Owner of Account 002864366166 which was a money market saving account. (RP 1660-1664)"
>
> 3. "Ms. Showalter was told that she was the owner of the two accounts on the computer screen and that neither was an escrow account. (RP 1660-1664)"

6. "On or about October 19, 1998, Ms. Showalter withdrew her $158,813.77 from her Account 002864366166 and had the funds deposited in her other NationsBank account. This was pursuant to advice from her attorney. The funds were then transferred from that account and deposited in her Everen Securities account. These transactions were necessarily accomplished with the complex knowledge cooperation and approval of NationsBank. Ms. Showalter followed every NationsBank procedure and requirement and accessed her account electronically via the telephone banking system with her social security and PIN numbers. (RP 1628-1629) (RP 1677-1681)"

7. "According to the NationsBank Access Identification Agreement and Disclosure:

Dear NationsBank Customer:

Beginning on July 12, 1998 you will be able to transfer funds between accounts using your Access ID and Personal Identification Number (PIN). The agreement goes on to provide in Part 1(d) that NationsBank will link all your deposit and personal credit accounts that are eligible unless you tell us otherwise. (RP0618-630)"

8. "A withdrawal of $158,813.77 would have received close review by Bank personnel to assure the withdrawal was correct. Part of that review would include a careful verification that Ms. Showalter was authorized to withdraw the funds. (RP1682-1689)"

9. "NationsBank Domestic Wire

Transfer-Secondary Approval: documentation states on its face that the wire transfer was "Transaction Approved ID: 61011019980735" and clearly demonstrates that this wire transfer was authorized and approved by NationsBank. (RP 0223)"

10. "At no time did anyone at NationsBank inform Ms. Showalter that she was not entitled to withdraw funds from the account. In fact all representations were to the contrary. (RP 1620-1627)"

"The obvious conclusion is that NationsBank had established an account that allowed Ms. Showalter to withdraw her money."

"Under these facts the law of New Mexico does not permit the drastic remedy of summary judgment. The Court shall not resolve factual issues. Where there is the existence of a material factual dispute and where evidence does not exist, summary judgment is improper; in reviewing an appeal from an order granting summary judgment, this court shall review the matters presented in the light most favorable to support a trial on the merits; summary judgment is improper, where there is the slightest doubt as to the existence of a material factual dispute; and where evidence is susceptible to reasonable or logical conflicting influences bearing on material facts, summary judgment is improper. Showalter respectfully requests that Court follow these rules and reverse the grant of Summary Judgment regarding NationsBank."

Based on this Motion, New Mexico Court of Appeals reversed the District Court decision on Petitioners Unfair Trade Practice claim in Petitioners favor against Albuquerque Title Company, Inc. [3](ATC)

New Mexico Appellant Court found,

> "Showalter's affidavit to the effect that ATC agreed to place her monies in a separate account established a genuine issue of material fact as to whether ATC stated that the transaction involved rights (the creation of a separate account for Showalter) that it did not involve and as to whether ATC failed to deliver services that it contracted with Showalter to provide."[4]

NationsBank's memorandum in support of motion for Summary Judgment, attached ATC testimony, "There were two accounts; one for Midwest and one for Susan[5]" and documentary evidence in Petitioners Response to Summary Judgment of ATC supports the fact ATC represented there were two accounts; letter written by ATC to NationsBank requested "Closing of trust accounts;"[6] there were two title company forms for the investment of funds.[7] This is evidence that ATC represented there were two accounts and no disputed material facts regarding whether ATC failed to deliver services they contracted with Showalter to provide. NMSA 57-12-2 (D) (17)

The Court further stated,

"Even assuming that ATC did not have the

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[3] Memorandum Opinion, March 20, 2002 (RP2002)
[4] Memorandum Opinion, March 20, 2002, (RP2000)
[5] Deposition McIntyre, ATC (RP1406)(RP0388)
[6] ATC letter (RP1066)
[7] Investment Forms (RP1830,1845,1846)

> authority to open a separate account for Showalter, the Unfair Trade Practices Act nevertheless can be invoked. The essence of an Unfair or deceptive trade practice is the misrepresentation. As alleged by Showalter, a violation can occur by stating that a transaction involves rights that it does not involve. Section 57-12-2(D)(15) Therefore, if ATC agreed, as Showalter alleges, to place her earnest money deposit in a separate bank account, its statement of agreement is a misrepresentation that violates the Act because it is false and misleading and may tend to or does deceive."[8]

Court failed to recognize 57-12-2(D) (15) includes "stating a transaction has rights, remedies, or obligations, which it does not." ATC represented Petitioner could collect against the equity in the property, a remedy that Petitioner did not prevail on. Court recognized Showalter's claim 57-12-2(D)(14) that an Unfair Trade Practice may occur by using innuendo or ambiguity as to a material fact if doing so deceives or tends to deceive.

Court of Appeals acknowledged,

> "Showalter bases her Unfair Trade Practices counterclaims on NMSA 1978, § 57-12-2 (E(1)(2) which identifies as "unconscionable trade practice" any act in connection with the provision of services which "results in a gross disparity between the value received by a person and the price paid."

Petitioner proved all elements of Unfair Trade Practices for an Unconscionable Trade Practice. In

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[8] Memorandum Opinion March 20, 2002 (RP2000)

her claims and to the New Mexico Court of Appeals throughout the litigation she argued,

> "The actions of ATC and NationsBank in knowingly misrepresenting that the transaction had rights or remedies which it did not have, failing to state material facts, and in failing to provide insurance, were misrepresentations made in connection with services and in the unauthorized extension of credit, in the ordinary course of business which to Appellant's detriment took advantage of her lack of experience to a grossly unfair degree and resulted in a great disparity between the value received by Appellant and the price paid [NMSA 57-12-2(D(E)]" Unconscionable Trade Practice of NationsBank and ATC to advance $318,705 in Petitioners name to close a transaction knowing Petitioner would not receive an interest in the title.

Court of Appeals reversed the Unfair Trade Practice claim in Petitioners favor, did not reverse the Summary Judgment on NationsBank's Complaint, affirmed the prior decisions of the Trial Court which granted NationsBank summary judgment on all Petitioners claims except Malicious Abuse of Process and a portion of her Unfair Trade Practice claim against NationsBank Stating "Because the court did not grant summary judgment on this Unfair Practices Act issue against NationsBank, we do not address Showalter's arguments in this regard."[9]

Judgment on Mandate did not accurately reflect the Memorandum Opinion affirming the Trial Court because NationsBank and ATC had only been granted

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[9] Memorandum Opinion March 20,2002 (RP1995)

partial Summary Judgment, Petitioner was a non-moving party as argued by Petitioner in Motion for Rehearing on Appeal 25,105, and the Court had not taken action consistent with the Mandate regarding Petitioners Unfair Trade Practice Claims in view of the fact that the Mandate noted the decision of the Trial Court is now final and remanded for further action consistent with the decision.[10]

Then, the Court allowed NationsBank to move for Summary Judgment on Petitioners remaining claims, which had already been heard in their motion for Summary Judgment on the Counter-Claim,[11] had survived Summary Judgment, no new evidence had been presented.

Petitioner's Counterclaims and Motion for Rehearing to Court of Appeals on 07/06/07 included the argument that the Court may have overlooked Fraud. Parol-evidence rule does not allow evidence to controvert an express agreement, however, it can be used to explain that an agreement was not fully integrated due to Buyer's refusal to provide documentation recognizing Petitioners interest in the title. It can also be used to show fraud, illegality or unconscionable practice. Court ruled Petitioner could move forward on Breach of an Oral agreement with ATC to protect her money[12] however Court of Appeals ruled her claims were Unfair Trade Practices.

New Mexico allows Unfair Trade Practice claims be judicially resolved.[13]

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[10] Mandate of Court of Appeals entered May 12, 2002
Judgment on Mandate entered October 11, 2002

[11] NationsBank Motion for Summary Judgment on the Complaint and the Counter-Claim (RP1381)

[12] Transcript February 1,2002

[13] *Lisanti v. Alamo,* 2002-NMSC-032
132 N.M. 750, 55 P.3d 962

Court of Appeals found there was no indication that the Trial Court did not consider Showalter's statement of undisputed facts in its consideration of NationsBank Summary Judgment, however Court did not consider her disputed facts. The purpose of summary Judgment is to focus the litigation on genuine issues of material fact and Civ.R.56 and case law do not support the proposition that a party responding to a Motion for Summary judgment has the burden to conclusively demonstrate its case, but to produce only enough evidence to show that a genuine issue of material fact exists for trial[14] Evidence relied upon by NationsBank was the testimony of ATC and Townsend (VP Security), in support of their argument that Petitioner was not a signatory on the account. Showalter motioned to strike hearsay testimony in Wisconsin, however, Court never ruled. She argued on Appeal, Motion in Opposition to Proposed Disposition that Townsend deposition, contradicted his prior affidavit. Attorney: Q: You never saw a signature card for this account? A: Never. (Townsend Deposition, pg. 47 lines 16-17). Petitioner's Response to NationsBank's Motion for Summary Judgment set forth specific facts showing genuine issues of material fact regarding the signature authority on the account including the signature card sent to Ms. Showalter with her name and social security number,[15] and Petitioner argued undisputed facts,[16] such that a genuine issue exists

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[14] Showalter Response to NationsBank Motion for Summary Judgment(RP1603)

[15] Showalter's Response to NationsBank Motion for Summary Judgment(RP1609)

[16] Showalter's Response to ATC (RP1788)

and the decision of the New Mexico Court of Appeals should be reversed.

Legal fees were granted to NationsBank based on Petitioner's Depository Agreement

United States Supreme Court has jurisdiction when fundamental and substantial rights have been affected by lack of due process and jurisdiction over a proceeding where Petitioner claimed Title to an Instrument or an Interest in Property. In her Counterclaim for Malicious Abuse of Process and in Motion for Rehearing to Court of Appeals Petitioner argued she had no Notice of the temporary restraining Order, she was not named, and "Personal service cannot be waived for collection of a purported debt." Wisconsin Court directed the litigation be for the legal right to the funds. NationsBank was not entitled to legal fees "pursuant to common law, statute, or court rules." New Mexico Court of Appeals found no abuse of process because Showalter was not sued by NationsBank in Wisconsin.

Wisconsin Judge stated, "It will be the Order of this Court, there's been no service of any of the summons and complaint yet in this case that this case be dismissed without prejudice and costs."[17] The Order should be void.

Seller, Lender on the REC, issued instructions to close, refused to recognize Petitioner's interest in the Title, did not join the Declaratory Judgment, Sued Petitioner for Quiet Title. New Mexico Court of Appeals found the Court had no obligation to consolidate the cases even though Petitioner had conversion claims in this case.

No Party filed any cross-appeals.

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[17] Transcript Wisconsin CV-008851 (RP2435)

CONCLUSION

Rights in Property are basic civil rights Congress intended to protect in the Act of 1871 and the Supremacy Clause.

Petitioner requests this Court rectify procedural improprieties which have exceeded the boundaries of normal and accepted judicial proceedings such as to call for this Court's exercise of its supervisory powers. Federal law preempts the State with regard to recordkeeping of funds transfers and in disclosures required to be made by Federal law in the sale of insurance if it provides greater protection for the Consumer.

Under the facts, the law of New Mexico does not permit the drastic remedy of summary judgment for the Bank Petitioner asks this Court to review the matters in the light most favorable to support a trial on the merits; Showalter respectfully requests that Court follow these rules and reverse the grant of Summary Judgment regarding NationsBank on their Declaratory Judgment, reverse Petitioners claims which did not survive Summary Judgment, award damages pursuant to the Mandate of the Cour of Appeals under the Unfair Trade Practice Act or dispose of the case on the merits of her Claims.

CERTIFICATE OF PETITIONER

Petitioner certifies that this Petition for Rehearing is based upon substantial grounds not previously presented, and is presented in good faith and not for purposes of delay.

Respectfully Submitted,

"s/" Susan B. Showalter
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